Hanes Corporation *and* Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC. Cases 5-CA-12348 and 5-CA-12483

February 26, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On December 23, 1980, Administrative Law Judge Michael O. Miller issued the attached Decision in this proceeding. Thereafter, Respondent and the Charging Party filed exceptions and supporting briefs, and the Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge, as modified herein, and to adopt his recommended Order, as modified herein.

We agree with the Administrative Law Judge that Respondent violated Section 8(a)(5) of the Act by refusing to bargain with the certified representative regarding the specific, discretionary aspects of a wage increase, of rules respecting the wearing of respirators, and of an economic layoff.[1] Inasmuch as it was the refusal to bargain over these discretionary aspects rather than Respondent's unilateral but lawful effectuation of the established or nondiscriminatory aspect that constitutes the violations in the circumstances of this case, we hereby modify the Administrative Law Judge's "Further Conclusions of Law," paragraph 2, to reflect the precise violation committed, and we shall modify the recommended Order accordingly.

Further, we find no record support for the Administrative Law Judge's conclusion that regardless of whether Respondent acted unilaterally or consulted with the Union regarding the economic layoff, the employees would have been laid off for the same number of days as their actual layoff. We agree with the Administrative Law Judge that a layoff substantially equal in extent to the layoff effected was an economic necessity, and that it was, by virtue of past practice, an established condition of employment in these circumstances. However, Respondent's past layoffs involved complete or partial layoffs, reduced work schedules, etc., and were for varying lengths of time, and we can only speculate whether the result of bargaining inevitably would have resulted in a layoff of the same number of employees for the same period. Therefore, we find that Respondent violated Section 8(a)(5) by refusing to bargain over the timing of the layoff, the manner in which it would be implemented, and the selection of employees to be exempted from it, all as found by the Administrative Law Judge.

THE REMEDY

1. We agree with the Administrative Law Judge that any attempted make-whole remedy for the laid-off employees is inappropriate. Since the immediate remedial objective is to restore the *status quo ante*, and since we have found, in agreement with the Administrative Law Judge, that a layoff substantially equal in extent to the layoff effected unilaterally was inevitable, we perceive no basis on which to predicate a finding that any identifiable employee suffered a loss of pay because the layoff was implemented unilaterally. Cf. *Ramos Iron Works, Inc. and Rasol Engineering*, 234 NLRB 896, 906 (1978); *Hedison Manufacturing Company*, 249 NLRB 791, 794, 828 (1980).[2] Likewise, we have no basis for assessing loss to any employee because of the length of the layoff.

Similar considerations apply to the propriety of litigating further the issue of backpay for employees who might have been called back for repair work instead of those whom Respondent called back, unilaterally, but according to seniority and training. The Administrative Law Judge concluded that it was appropriate to leave to the compliance stage the determination of which employees might have been called back.[3] That conclusion, however, is based on pure speculation, and we fail to see how the compliance proceedings can accurately identify such employees. Any finding based on such speculation as to the possible outcome of bargaining over their identities would constitute an impermissible intrusion by the Board into the substance of bargaining.

What is before us is a refusal to bargain over the discretionary aspects of a nondiscriminatory layoff that would have occurred regardless of good-faith

[1] In light of our decision in *Hanes Corporation*, 254 NLRB 1041 (1981), Respondent's contention that the Union was improperly certified is without merit. With respect to Respondent's contention that its 1980 enforcement of respirator rules was pursuant to rules promulgated in 1978, before it was obligated to bargain with the Union, we note that Respondent chose to suspend its 1978 rules pending a legal challenge to the OSHA regulations making the wearing of respirators by certain employees mandatory. Respondent's implementation of the rules in 1980, even if substantially the same as the 1978 rules, was a mandatory subject of bargaining.

[2] We also note that there is no evidence of a practice whereby employees laid off for lack of work in one department normally were transferred to other departments. Cf. *Hedison Manufacturing Company, supra*.

[3] Inadvertently, the Administrative Law Judge omitted such a provision from his recommended Order.

bargaining. Our treatment of the remedial questions arising from such a violation should be consistent with our treatment of an analogous violation, the refusal to bargain over the effects of a plant closure in situations where there was no duty to bargain over the decision to close. There, backpay begins to run only after the date of the Board's decision and ends when certain conditions are met. See *National Family Opinion, Inc.*, 246 NLRB 521, fn. 5 (1979). Here, the cause of the loss of pay, the layoff, has long since ended. Consequently, no loss can be suffered after the date of this Decision, and a make-whole remedy is, therefore, inappropriate.[4]

2. We agree with the Administrative Law Judge's formulation of a remedy for Respondent's termination of employee Kilby pursuant to an unlawfully implemented respirator rule. However, we believe that the condition imposed for Kilby's reinstatement after the parties have bargained in good faith over the respirator rules needs clarification. The Administrative Law Judge recommends that Kilby be reinstated if he "is able to comply" or, as he states in the recommended Order, Kilby "is willing and able to comply" with the rules that result from good-faith bargaining. Inasmuch as Kilby was unable to comply with the existing rule because he was unwilling to shave his beard, the condition that he be "able" to comply might be ambiguous and could engender a further dispute over his eligibility for reinstatement; i.e., is he "able" to comply with or without his beard? With the understanding that it will be Kilby's choice whether or not to tailor his beard, if necessary, to the resulting rules, we shall impose the condition that he "complies" with them. Further, to clarify the make-whole remedy for Kilby's termination, we hereby modify the conditions for cutting off his accumulation of backpay by adding to the Administrative Law Judge's remedial conditions (2), (3), and (4), the words, "regarding this subject."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Hanes Corporation, Galax, Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(a):

"(a) Refusing to bargain collectively concerning the size and timing of wage increases, the specific types of respirators employees are required to wear, the timing, length, and manner of implementation of layoffs, and the selection of employees to be exempted from layoffs, and other terms and conditions of employment with Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, as the exclusive bargaining representative of its employees in the following appropriate unit:

> "All employees employed by the Employer at its Brooks Plant, Galax, Virginia, location, but excluding all office clerical employees, professional employees, guards, and supervisors as defined in the Act."

2. In paragraph 2(b), substitute the word "complies" for "is willing and able to comply."

3. Add the following as paragraph 2(c) and reletter the subsequent paragraphs accordingly:

"(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order."

4. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

> To engage in self-organization
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
>
> To refrain from the exercise of any or all such activities.

WE WILL NOT refuse to bargain collectively concerning the size and timing of wage increases, the specific types of respirators employees are required to wear, the timing,

[4] The 2-week minimum backpay award provided in plant closure cases is inappropriate here because no further bargaining over the effects of this layoff is contemplated. See *Transmarine Navigation Corporation*, 170 NLRB 389, 390 (1968).

length, and manner of implementation of layoffs, the selection of employees to be exempted from layoffs, and other terms and conditions of employment with Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, as the exclusive representative of the employees in the bargaining unit described below. Nothing in the Order of the National Labor Relations Board, however, requires that we revoke any wage increases previously granted.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed under Section 7 of the National Labor Relations Act.

WE WILL offer Mikel Kilby immediate and full reinstatement to his former position or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges previously enjoyed, if he complies with such respirator rules as may result from our bargaining with the Union on the subject of respirator rules, and WE WILL make him whole for any loss of earnings he may have suffered because of our unlawful conduct, with interest.

WE WILL, upon request, bargain with Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, as the exclusive bargaining representative of all employees in the bargaining unit described below with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The appropriate unit is:

> All employees employed by Hanes Corporation at our Brooks Plant, Galax, Virginia, location, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

HANES CORPORATION

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge: These cases[1] were heard by me in Galax, Virginia, on October 7 and 8, 1980,[2] based on charges filed by the Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, herein called the Union, and complaints and amended complaints issued on behalf of the National Labor Relations Board, herein called the Board, by the Regional Director and Acting Regional Director for Region 5 of the Board.[3]

The complaints allege that Hanes Corporation, herein called Respondent, violated Section 8(a)(1) and (5) of the National Labor Relations Act, herein called the Act, by unilaterally changing its employees' terms and conditions of employment without bargaining with their certified collective-bargaining representative. Respondent's timely filed answers deny the commission of any unfair labor practices.

All parties were afforded full opportunity to appear, to examine and cross-examine witnesses, and to argue orally. The General Counsel, Respondent, and the Union have all filed excellent briefs which have been carefully considered.

Based on the entire record, I make the following:

FINDINGS OF FACT[4]

I. RESPONDENT'S BUSINESS AND THE UNION'S LABOR ORGANIZATION STATUS—PRELIMINARY CONCLUSIONS OF LAW

Respondent is a North Carolina corporation engaged in the manufacture and sale of clothing apparel at its Brooks Plant in Galax, Virginia, and elsewhere. Jurisdiction is not in issue. The complaints allege, and Respondent's answers admit, that Respondent meets the Board's standards for the assertion of jurisdiction over nonretail enterprises and is engaged in commerce within the meaning of the Act. I therefore find and conclude that Respondent is an employer, engaged in commerce, within the meaning of Section 2(2), (6), and (7) of the Act.

The complaints allege, Respondent admits, and I find and conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Union's Certification*

On June 25, pursuant to an election conducted on November 20 and 21, 1979, in Case 5-RC-11004, the Board certified the Union as the collective-bargaining representative of all of Respondent's employees in the following appropriate bargaining unit:

> All employees employed by Hanes Corporation at its Brooks Plant, Galax, Virginia location, but ex-

[1] These cases had been consolidated for hearing with the consolidated complaint in Cases 5-CA-11794 and 5-CA-11815. At the hearing, the General Counsel and Respondent entered into an informal settlement agreement resolving the issues raised by the complaint in Cases 5-CA-11794 and 5-CA-11815. The settlement agreement was approved by the Administrative Law Judge and that complaint was severed from the instant complaints.

[2] All dates hereinafter are 1980 unless otherwise specified.

[3] The charges in Cases 5-CA-12348 and 5-CA-12483 were filed by the Union on June 24 and July 31, respectively. The complaint in Case 5-CA-12348 issued on July 31 and was amended on September 3. The complaint in Case 5-CA-12483 issued on September 4 and was amended on September 24. The cases were consolidated for hearing pursuant to an Order which issued on September 18.

[4] The facts in these cases are essentially undisputed, the findings herein are based on the stipulations of the parties and uncontradicted testimony.

cluding all office clerical, professional employees, guards and supervisors as defined in the Act.

Since on or about April 21, the Union has requested and continues to request to bargain collectively with the Employer as the employees' representative. Respondent, however, has refused to bargain, contending that the Board improperly overruled its objections to the election and that, consequently, the certification is invalid and it is under no obligation to bargain. Respondent's challenge to the Union's certification is pending before the Board on a Motion for Summary Judgment in Case 5-CA-12494.[5]

B. *The Contentions of the Parties*

The General Counsel and the Union contend that Respondent was under an obligation to bargain with the Union from the date of the Union's election victory on November 21, 1979. Part and parcel of that obligation, they correctly contend, is the duty of the employer to refrain from making changes in the working conditions of unit employees even while post election challenges or objections are pending. As the Board carefully reiterated in *Mike O'Connor Chevrolet-Buick-GMC Co., Inc.*, 209 NLRB 701, 703 (1974):

> The Board has long held that, absent compelling economic considerations for doing so, an employer acts at its peril in making changes in terms and conditions of employment during the period that objections to an election are pending and the final determination has not yet been made. And where the final determination on the objections results in the certification of a representative, the Board has held the employer to have violated Section 8(a)(5) and (1) for having made such unilateral changes. Such changes have the effect of bypassing, undercutting, and undermining the union's status as the statutory representative of the employees in the event a certification is issued. To hold otherwise would allow an employer to box the union in on future bargaining positions by implementing changes of policy and practice during the period when objections or determinative challenges to the election are pending. . . .

See also *Allis-Chalmers Corporation*, 234 NLRB 350 (1978), enfd. in relevant part 601 F.2d 870 (5th Cir. 1979).

Specifically, the General Counsel and the Union contend that Respondent unilaterally granted its employees a wage increase in January, unilaterally implemented a program and rules concerning the wearing of respirators to comply with the mandate of the Occupational Safety and Health Administration (OSHA) in May, discharged an employee for his failure to comply with the improperly implemented rules, and unilaterally laid off employees in June. Respondent contends, initially, that it is not obligated to bargain with the Union at all because the certification is invalid. Beyond that contention, which is not before me, Respondent admits that it unilaterally took each of the actions alleged but contends that none of those actions were changes in the terms and conditions employment.

C. *The Wage Increase*

The parties stipulated that, on January 1, the Employer granted an 8.1-percent wage increase to the Galax employees without notice to or bargaining with the Union. The records reflects that this was an "across-the-board" increase granted to all of the employees in the 10 plants which make up Respondent's knitwear division. The amount of the wage increase and the date it would be granted were determined by the management of the plants in the division with the approval of corporate management. The size of the annual wage increase, it was testified, was based generally, without any fixed formula, on such factors as inflation and the profitability of the knitwear division.

The record further indicates that the wage increase was similar to those granted to all of the employees in the knitwear division plant in prior years. Thus, in January 1978 and 1979, all of those employees received wage increases of 7.1 percent and 9.4 percent, respectively. Across-the-board raises had also been given to all of these employees, in unspecified amounts, in August 1975, July 1976, and again in July 1977. The record contains no evidence of Respondent withholding a wage increase in one plant while implementing it in others within the same division.

Respondent contends that its wage increase practices since 1975 establish that the granting of such a wage increase became part of the existing wage structure and that, had it declined to grant the January increase, its failure to do so would have constituted a violation of the Act. In support of this contention Respondent cited *Verona Dyestuff Division Mobay Chemicalm Corporation*, 233 NLRB 109 (1977). Therein, an employer who was refusing to bargain in order to test certification denied the unit employees "the annual wage increase and additional holiday" which it granted to all of the other employees in its plant notwithstanding that the union had advised the employer of its agreement that the increase and additional holiday be granted. The Board held that the employer's conduct, withholding those increases and benefits from employees who otherwise would have received them, because they had chosen the union as their collective-bargaining representative, violated Section 8(a)(3) and (1) of the Act. See also *Florida Steel Corporation*, 220 NLRB 1201, 1203 (1975), and cases cited therein at footnote 10.

The General Counsel and the Union, pointing to the discretionary aspects of Respondent's wage increase policy, particularly as to size and timing, contend that there was no pattern of wage increases which Respondent was obligated to follow. They cited *Mosher Steel Company*, 220 NLRB 336 (1975), wherein an employer who was engaged in collective bargaining (unlike Respondent herein) granted its employees both a general

[5] In view of the outstanding certification and the apparent agreement of all parties that these cases proceed as quickly as possible to decision, there appears to be no reason to withhold decision herein pending issuance of the Board's Decision and Order in Case 5-CA-12494.

wage increase and numerous individual increases. As to both types of wage increases, the employer had retained considerable discretion in determining the amount of the increase (within a narrow range) and the time of year that they were to take effect. The Board, agreeing with the Administrative Law Judge, found that respondent's conduct in granting these wage increases "[w]hile negotiations with the union were continuing—all without affording the union notice or an opportunity to bargain," violated Section 8(a)(5) and (1) of the Act. The General Counsel also relied on *Allis-Chalmers, supra*. In that case, and in the subsequent *Allis-Chalmers* case, found at 237 NLRB 290 (1978), the Board held that the unilateral grant of an across-the-board wage increase during a period when the employer was challenging the union's certification violated Section 8(a)(5) "even when [such unilateral actions] are made . . . pursuant to an established company policy and with no antiunion motive." 234 NLRB at 354. *Allis-Chalmers'* raises were given pursuant to an established policy of reviewing wages semiannually and were, according to that employer, "merely an attempt to maintain the status quo."[6]

More recently, in *Charles Manufacturing Company*, 245 NLRB 39 (1979), the Board held that an employer who was engaged in collective bargaining did not violate Section 8(a)(5) "when it automatically implemented a set of wage increases for unit employees" which it had unconditionally committed itself to grant, as to both the amount and the time, prior to the advent of the Union. Therein, the Board, citing *Liberty Telephone, supra*, held that the wage increases had become established conditions of employment and that "[r]espondent did not violate its bargaining obligation when it subsequently implemented the increases as promised, *because its conduct was devoid of any element of discretion*." (Emphasis supplied.) That situation was thus distinguished from cases, such as *Allis-Chalmers*, "wherein an employer continues, after a bargaining agent has been selected, unilaterally to exercise its discretion with respect to wage increases granted pursuant to certain wage review programs." "What is required" in such cases, according to the Board, "is a maintenance of preexisting practices, i.e., the general outline of the program, however the implementation of that program (to the extent that discretion has existed in determining the amounts or timing of the increases), becomes a matter as to which the bargaining agent is entitled to be consulted." *Charles Manufacturing, supra*, fn. 1. *Oneita Knitting Mills, Inc.*, 205 NLRB 500, fn. 1 (1973). See also *State Farm Mutual Auto Insurance Company*, 195 NLRB 871, 890 (1972).

Thus, the problem herein is to determine whether and to what extent Respondent's wage review policy was discretionary. For, to the extent that its policy was devoid of discretion, it was obligated to continue it and that continuation, even without notice or bargaining, would not violate the Act. *Charles Manufacturing, supra*. On the other hand, to the extent that Respondent retained discretion, it was obligated to consult with the employees' representative before taking any action. *Oneita Knitting Mills, supra*.

The pattern of granting general wage increases once a year for the last 5 years to all of the knitwear division employees sufficiently establishes such increases as an existing term or condition of employment about which Respondent was not obligated to bargain. However, the wage increases were granted at several different times of the year in those 5 years and, at least for the last 2 years, had varied fairly substantially in amount.[7] I am therefore satisfied that, though the voice of the Brooks Plant management may have been small in determining the discretionary elements of the annual wage increase, Respondent Hanes Corporation had, in fact, retained significant elements of discretion as to both its size and its timing. It was therefore obligated to bargain with the Union about those discretionary elements and its failure to do so constituted a violation of Section 8(a)(5) and (1) of the Act.[8]

D. *The Respirator Rules*

Respondent's implementation of rules requiring that respirators be worn in certain areas of the plant raises issues similar to those discussed above. The record reflects that pursuant to regulations promulgated by the Occupational Safety and Health Administration (OSHA) (CFR, Ch. XVII, § 1910.1043). Respondent posted the following notice, dated May 9, 1980:

> Effective Sunday, May 11, 1980, all employees, working in areas where exposure to cotton dust exceeds a permissable [sic] exposure limit, will be require [sic] to wear respirators. In order to comply with the Federal OSHA Regulations, these areas will be posted with the OSHA required sign, and proper respirator usage will be a condition of employment for everyone working in these areas.
>
> Proper respirator usuage, as defined by OSHA, requires a good face-to-respirator seal. This means there can be no facial hair (beards or certain types of sideburns) which prevents the face-to-respirator contact.

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[6] Compare *Liberty Telephone & Communications, Inc.*, 204 NLRB 317, 318 (1973), wherein the Board, reversing the Administrative Law Judge's Decision, held that the employer violated Sec. 8(a)(5) by withholding a wage increase which the employer had earlier promised to grant its employees even though that wage increase was conditioned upon the approval of the Internal Revenue Service. The Board stated:

> The Administrative Law Judge's view that any other course than that taken by Respondents would have subjected them to unfair labor practices is in error. No violations of the Act can normally result where an employer in good faith consults the bargaining representative before taking action on such matters . . .

[7] An increase of 9.4 percent, as granted in 1979, is nearly one-third larger than the increase of 7.1 percent which was granted in 1978. In *Mosher Steel, supra*, the Board found ample discretion in determining the amount of the general wage increase where it had varied only between 5 and 6 percent.

[8] It may be argued by Respondent that Board law places upon the employer a difficult burden, one which puts it at substantial peril. However, it must be noted that the risk is one of Respondent's own choosing; notification to, and bargaining with, the Union would have obviated the risk. See *Liberty Telephone, supra*. As stated in *Mike O'Connor Chevrolet, supra*: "an employer acts at its peril in making changes in terms and conditions of employment during the period that objections to an election are pending and the final determination has not yet been made."

Respondent offered its employees a choice among three types of respirators; all, it contended, required clean shaven skin for proper fit.

Respondent admitted that it instituted the above requirements without notice to or bargaining with the Union. The General Counsel and the Union agree that the OSHA regulations mandated the implementation of a respirator program; they contend however that, in adopting and enforcing its particular rules, Respondent had an obligation to bargain with the Union.

One long-term employee, Mikel Kilby, an electrician, refused to comply with the respirator requirements as adopted by Respondent. Kilby wore a full beard and, for undisclosed but obviously sincerely held reasons, he refused to shave any portion of it. He asked Respondent to provide him with a "space helmet" type of respirator such as it provided one employee, who had a disability incurred from exposure to Agent Orange during the Vietnam conflict which prevented him from shaving. The space helmet respirator was considerably more expensive than any of the three types of respirators Respondent provided for general use. Respondent refused Kilby's request though it indicated that if he were to buy one himself he could retain his employment.[9]

Respondent, in implementing its respirator regulations, relied on OSHA's standards which provided as follows:

> The employer shall assure that the respirator used by each employee exhibits minimum face piece leakage and that the respirator is fitted properly. [29 CFR Sec. 1910.1043 (g)(4)(i).]
>
> Respirators shall not be worn when conditions prevent a good face seal. Such conditions may be a growth of beard, sideburns, a skull cap that projects under the face piece, or temple pieces on glasses. Also, the absence of one or both dentures can seriously affect the fit of a face piece . . . [29 CFR Sec. 1910.134 (e)(5)(i).]

The OSHA cotton dust regulations did not require that employees use any specific respirator. For such cotton dust concentrations as were found in the Brooks Plant, the regulations permitted the use of three different types of respirators including those designated as high efficiency particulate filter respirators with a fullface piece, supplied air respirators with fullface piece, helmet, or hood, or self-contained breathing apparatus with fullface pieces. Respondent's witness, Mackey McDonald, its director of manufacturing at the Brooks Plant, acknowledged that there were probably other respirators, beyond the three provided by Respondent, which would meet OSHA's requirements. OSHA regulations, section 1910.1043 (f)(2)(ii), provide that selection of respirators be made from among those tested and approved by the National Institute for Occupational Safety and Health (NIOSH) and the Union contends that the (NIOSH) listed 119 respirators which it had approved for use as protection against cotton dust.

[9] An offer was even made to loan Kilby the money to make such a purchase.

In addition to contending that its adoption and implementation of the respirator requirements were mandated by the OSHA regulations, and thus not subject to collective bargaining, Respondent contended that its rules did not constitute a change in the working conditions because they had been initially adopted in 1978, but were held in abeyance since that time pending resolution of legal issues surrounding the implementation of OSHA's cotton dust standards. Thus, those standards were initially scheduled to become effective on October 4, 1978, and, at that time, Respondent had promulgated certain rules requiring the wearing of respirators. While the record does not reflect whether the rules promulgated in 1978 were identical to those published in 1980, it appears from Kilby's objections raised at that earlier date that they, like the current rules, would have required him to remove some or all of his beard to comply. Implementation of those standards in 1978 was stayed on October 2, 1978, by Order of the United States Court of Appeals for the District of Columbia.[10] Respondent posted a notice informing the employees of the stay and advising them that the use of the respirators would not be required at that time. That notice went on to state: "If after further review the courts decide the regulations will continue we will do whatever the law requires." Respondent continued to offer "[b]oth types of respirators" which it had made available to the employees, for their use on a voluntary basis, but did not again require the wearing of respirators until the Court's stay was lifted.[11]

Based on all of the forgoing, I must agree with the General Counsel and the Charging Party that Respondent's failure to notify and consult with the Union on the details of its implementation of the OSHA regulations violated Section 8(a)(5) and (1) of the Act.[12] As contended by the General Counsel and the Union, the OSHA regulations left open to the subject employers significant flexibility and latitude in implementing steps necessary for compliance. Thus, with a number of approved respirators to chose from, Respondent could have bargained over the particular respirators to be worn. Additionally, bargaining might have been fruitful over whether or not facial hair precluded the proper wearing of a respirator. I note, in this regard, that the OSHA regulation does not preclude facial hair but only suggests that facial hair and other conditions might impede the formation of a proper fit.[13] Moreover, consultation with the Union in regard to the type of respirator to be worn, or to the question of whether a beard prevents a proper seal with the different kinds of respirators, and on the question of who should bear the cost of providing acceptable but more expensive respirators, might have provided a

[10] *American Textile Institute, Inc.* v. *Dr. Eula Bingaam, et al.*, 1978 OSHD par. 27, 852 (Docket No. 78-1979).

[11] See *AFL-CIO* v. *Ray Marshall, Secretary of Labor*, 1980 OSHD par. 24, 150.

[12] Neither the General Counsel nor the Charging Party appears to contend that Respondent was obligated to bargain over the general question of whether respirator usage would be required. That, they acknowledged, was mandated by OSHA.

[13] Respondent's rule, specifically alluding to beards and certain types of sideburns, makes no reference to the wearing of glasses or the failure to wear dentures which OSHA also suggested might interfere with the proper fit.

way for Mikel Kilby to satisfy the OSHA standards and retain his job.

Finally, I cannot accept Respondent's argument that the rule as implemented on May 11 was but a continuation of the earlier rule promulgated in October 1978. The earlier rule was never actually implemented and was not enforced. Additionally, the record does not establish that it was the same rule as that implemented in 1980.[14]

Accordingly, I conclude that by unilaterally adopting and implementing the specifics of its respirator rule, precluding the wearing of facial hair and requiring that employees use specific kinds of respirators, Respondent has violated Section 8(a)(5) of the Act. *J. P. Stevens & Co., Inc.*, 239 NLRB 738 (1978). I further find that employee Mikel Kilby was terminated because of his refusal to comply with the respirator rules which Respondent unlawfully promulgated and implemented.

E. *The June Layoff*

All employees of Respondent's men's briefs department, of whom there were approximately 230, were laid off during the last 2 weeks of June.[15] During the last week in June, certain employees in other departments, performing work related to that of the men's briefs department, were also laid off. Three employees, selected on the basis of their plant seniority and training, were recalled to do repair work on the briefs in that second week. The layoff was announced by a notice posted on June 9 which stated as follows:

> Over the last several weeks the orders from our retailers and distributers for our briefs have been decreasing. Our most recent forecast and June orders indicate that this trend will continue. For these reasons, it will be necessary to stop production in all Stateside and Offshore BRIEFS SEWING and BRIEFS RELATED DEPARTMENTS prior to our scheduled vacation closing. Our information indicates no change in our T-shirts and A-shirts production at this time.

The parties stipulated that the layoff was made without prior notice to or bargaining with the Union.

Where the layoff of employees constitutes a change in the terms and conditions of their employment, an employer is obligated to give the union notice and an opportunity to bargain. See, for example, *Sundstrand Heat Transfer, Inc., Triangle Division*, 221 NLRB 544 (1975), and *Allis-Chalmers Corporation*, 234 NLRB 350 (1978). Respondent, however, contends that its June 1980 layoffs were "conducted in a manner consistent with the Company's long-established practice for conducting temporary layoffs to reduce inventory." This procedure, it argued, had become one of the existing conditions of employment which Respondent was bound to continue and on which Respondent was not obligated to give the Union notice or an opportunity to bargain.

Thus, the Company points to its policy statement dated May 6, 1975, which provides among other things, that layoffs of 2 weeks or less were considered temporary layoffs to which the Company's seniority policies were inapplicable. It points also to layoffs it has had in the past. Since 1974, there have been occasions when entire departments were temporarily laid off for full workweeks and others when they were placed on reduced schedules of 3 or 4 days per week in order to curtail production. After early 1979, when employees allegedly expressed a preference for full week layoffs (because such layoffs entitled them to unemployment compensation), Respondent has reduced its inventory backlogs by laying employees off for full weeks. In July 1979, the employees of the men's briefs department were laid off for the last week of Respondent's fiscal year because of a buildup of inventory resulting from the failure of actual sales to meet the sales figures which had been projected for the period.

Layoff practices, like an employer's practices in regard to the granting of wage increases, are a mandatory subject of bargaining. See *N.L.R.B.* v. *Frontier Homes Corporation*, 371 F.2d 974, 980 (8th Cir. 1967). An employer in Respondent's circumstance is privileged to continue its layoff or wage practices unchanged without notification to or bargaining with the Union. However, where an employer retains substantial discretion in regard to the manner that a layoff or a wage practice will be implemented, it must bargain with its employees' representative before such implementation. See *Oneita Knitting Mills, supra*. See also *Charles Manufacturing Company, supra*, and the *Allis-Chalmers* cases, also cited *supra*.

The facts in the instant case, I am convinced, establish that Respondent had a practice of laying off its employees whenever necessary to balance inventory with actual or projected sales. It was, therefore, privileged to continue this policy without notice or bargaining. However, I find that in its practice it retained considerable discretion, particularly as to the timing of layoffs, as to whether or not the layoff would encompass entire workweeks or would take the form of shortened workweeks, and as to which employees might be exempted or called back from such a layoff for special purposes. Respondent's history of layoffs establishes that they may occur at different times of year; there was no established practice mandating that the layoff occur in the last 2 weeks of the fiscal year. Similarly, the layoff in the last week of June 1979, a single incident, does not establish a practice of laying employees off for a full workweek rather than shortening several workweeks in order to achieve a needed reduction. Indeed, Respondent's justification for choosing the full workweek layoff, i.e., that some employees expressed that as a preference, establishes that this matter is highly discretionary and particularly fit for collective bargaining. Additionally, the evidence indicates that Respondent called back three sewers to perform repair work in the men's briefs department and that those three were selected upon both objective (plant seniority) and subjective (training) factors. Respondent ap-

[14] In this regard I note that the 1978 rule refers to "[b]oth types of respirators"; McDonald's testimony established that Respondent's 1980 rule permitted the use of three kinds of respirators. Thus, it appears that the rules may not have been the same.

[15] The layoff also affected the employees in the men's briefs departments through out the knitwear division.

parently had no established practice or policy governing the selection of such employees for exemption from layoff. This too is a fit subject for collective bargaining.

Accordingly, I find that while Respondent had no obligation to bargain with the Union about whether or not there would be a layoff, that being an established term or condition of employment, it was obligated to bargain about the discretionary aspects of that layoff, the timing thereof, the manner in which it would be implemented, and the selection of employees to be exempted therefrom. To the extent that it failed to comply with its obligation, as it admitted that it did, Respondent has violated Section 8(a)(5) of the Act.

FURTHER CONCLUSIONS OF LAW

1. Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, is and has been at all times since November 21, 1979, the exclusive representative of Respondent's employees employed by Respondent at its Brooks Plant, Galax, Virginia, location, but excluding all office clerical employees, professional employees, guards, and supervisors as defined in the Act.

2. By unilaterally, without notice to or consultation with the above-named Union, granting wage increases to its employees on January 1, 1980, implementing and enforcing rules respecting the wearing of respirators in the plant as a condition of employment, and laying off certain employees in the weeks of June 16 and 23, 1980, Respondent has refused to bargain with the Union, in violation of Section 8(a)(5) and (1) of the Act.

3. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

4. Respondent did not engage in any unfair labor practices not specifically found herein.

THE REMEDY

It having been found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act, my recommended Order will require that it cease and desist therefrom and take certain affirmative action necessary to effectuate the policies of the Act.

I have found that Respondent has unlawfully refused to bargain with the Union by unilaterally granting wage increases to its employees. While Respondent will be ordered to cease and desist from such unlawful conduct, nothing herein shall be construed as requiring Respondent to revoke any wage increases.

I have further found that Respondent unlawfully implemented the layoffs of certain employees during the last 2 weeks of June 1980. However, the vice of this conduct is found not in the fact that employees were laid off; its existing practice permitted unilateral layoff. It is evident from the record herein that the employees in Respondent's men's briefs department and in the related positions would have been laid off for the same number of days as they were, whether Respondent acted unilaterally or consulted with the Union. Rather, the violation lies in Respondent's unilateral selection of the time and manner of the layoffs and in the unilateral determination as to which employees would be exempted from portions of it. Accordingly, I do not deem it warranted to order a make whole remedy, generally, as to the laid-off employees. Cf. *Sundstrand Heat Transfer, Inc., supra* at 546. Such a remedy is warranted, however, for those employees who might have been called back for the repair work had Respondent fulfilled its obligation to bargain on that recall. It is appropriate to leave to the compliance stage of this proceeding the determination of who those employees might have been.

Mikel Kilby was terminated as a result of his refusal to comply with the terms of the unlawfully adopted respirator rules. In order to fully remedy this violation, it is necessary that Respondent offer him immediate and full reinstatement to his former position or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, if, after Respondent has bargained in good faith with the Union concerning the respirator rules said Kilby is able to comply with whatever respirator rules result from such bargaining, and make him whole for any loss of earnings he may have suffered from the date of his termination until the earliest of the following conditions: (1) the date Respondent bargains to agreement with the Union on its rules regarding the wearing of respirators; (2) a bona fide impasse in bargaining; (3) the failure of the Union to request bargaining within 5 days of Respondent's notice of its desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith. This limited backpay requirement is necessary in order to make the employee whole for the losses, if any, he suffered as a result of the violation and to recreate in some practical manner a situation in which the Union's bargaining position is not entirely devoid of economic consequences for Respondent. See *Uncle John's Pancake House*, 232 NLRB 438, 440 (1977).

All backpay due under the terms of this Order shall be computed, with interest, in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[16]

The Union argued that Respondent should be required to reimburse both the Board and itself for reasonable attorneys' fees and costs incurred in this litigation, contending that *Tiidee Products, Inc.*, 194 NLRB 1234 (1972), enfd. as modified *sub nom. International Union of Electrical, Radio and Machine Workers, AFL-CIO* v. *N.L.R.B.*, 502 F.2d 349 (D.C. Cir., 1973), authorized such a remedy in order to discourage frivolous litigation. While I have found that Respondent violated the Act essentially as alleged in the complaint, I have also found that its conduct, in certain regards, was not violative of the Act. Moreover, the issues presented herein, even where I found against Respondent, were substantial, or at least debatable. The litigation in this case was not frivolous. Accordingly, I reject the Union's request for extraordinary remedies. *Kings Terrace Nursing Home and Health Facility*, 227 NLRB 251 (1976).

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

[16] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

ORDER[17]

The Respondent, Hanes Corporation, Galax, Virginia, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Unilaterally granting wage increases, adopting or enforcing rules respecting the wearing of respirators in the plant as a condition of employment, laying off employees, or changing other terms and conditions of employment without notice to and bargaining with Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All employees employed by the Employer at its Brooks Plant, Galax, Virginia location, but excluding all office clerical employees, professional employees, guards, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively and in good faith with Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, concerning wages, hours, and other terms and conditions of employment of its employees and, if an understanding is reached, embody such understanding in a written agreement.

(b) Offer Mikel Kilby immediate and full reinstatement to his former position or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges if, after Respondent bargains in good faith with the Union concerning the respirator rules, said Mikel Kilby is willing and able to comply with the rules which result from said collective bargaining, and make Mikel Kilby whole for any loss of earnings he may have suffered by reason of Respondent's unlawful conduct herein in the manner set forth in the section of this Decision entitled "The Remedy."

(c) Post at its place of business in Galax, Virginia, copies of the attached notice marked "Appendix."[18] Copies of said notice on forms provided by the Regional Director for Region 5, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[17] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[18] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."